



DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

Notice of Request Under the Freedom of Information Act for Federal Contractors' Type 2

Consolidated EEO-1 Report Data

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice.

SUMMARY: The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has received a request under the Freedom of Information Act (FOIA) from Will Evans of the Center for Investigative Reporting (CIR) for all Type 2 Consolidated Employer Information Reports, Standard Form 100 (EEO-1 Report), filed by federal contractors from 2016-2020. OFCCP has reason to believe that the information requested may be protected from disclosure under FOIA Exemption 4, which protects disclosure of confidential commercial information, but has not yet determined whether the requested information is protected from disclosure under that exemption. OFCCP is requesting that entities that filed Type 2 Consolidated EEO-1 Reports as federal contractors at any time from 2016-2020, and object to the disclosure of this information, submit those objections to OFCCP within 30 days of the date of this Notice.

DATES: Written objections to the FOIA request discussed herein are due **[INSERT DATE 30 DAYS FROM PUBLICATION]**.

FOR FURTHER INFORMATION CONTACT: Candice Spalding, Deputy Director, Division of Management and Administrative Programs, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C-3325, Washington, DC 20210. Telephone: 1-855-680-0971 (voice) or 1-877-889-5627 (TTY).

SUPPLEMENTARY INFORMATION:

Background

A. Background on the CIR FOIA Request and EEO-1 Reports

The FOIA request precipitating this Notice originated in January 2019, when Will Evans of CIR submitted a request for “[a] spreadsheet of all consolidated (Type 2) EEO-1 reports for all federal contractors for 2016.” CIR subsequently amended this request multiple times, most recently on June 2, 2022, to include Type 2 EEO-1 reports for all federal contractors, including first-tier subcontractors, from 2016-2020 (hereinafter “Covered Contractors”). The Type 2 EEO-1 report is one of several different types of reports that multi-establishment employers must file annually, which consists of a consolidated report of demographic data for all employees at headquarters as well as all establishments, categorized by race/ethnicity, sex, and job category.

Title VII of the Civil Rights Act of 1964 provides statutory authority for the EEO-1 Reports. The Equal Employment Opportunity Commission (EEOC) enforces this employment nondiscrimination law. 42 U.S.C. 2000e-8(c). The EEOC’s regulations require employers with 100 or more employees to file the EEO-1 Report with the EEOC. 29 CFR 1602.7. In addition, OFCCP’s regulations require federal contractors¹ and first-tier subcontractors that are covered by Executive Order 11246 and that have 50 or more employees to file the EEO-1 Report. 41 CFR 60-1.7(a).

The EEO-1 Report “is administered as a single data collection to meet the statistical needs of both agencies [EEOC and OFCCP].” *See* EEOC, Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 FR 5113, 5114 (Feb. 1, 2016) (hereinafter First PRA Comment Request). OFCCP’s regulations describe the EEO-1 Report as being “promulgated jointly . . . [with] the Equal Employment Opportunity Commission.” 41 CFR 60-1.7(a)(1); *see also* EEO-1 Joint Reporting Committee, EEO-1 Instruction Booklet 1, https://www.eeoc.gov/employers/eeo1survey/upload/instructions_form.pdf (describing the EEO-1 Report as “jointly developed by the EEOC and OFCCP”). The

¹ Hereinafter, all references to “contractors” or “federal contractors” includes first-tier subcontractors as well, unless specified otherwise.

EEO-1 Report is administered by the EEO-1 Joint Reporting Committee (JRC), which is composed of the EEOC and OFCCP and housed at the EEOC. EEOC, Agency Information Collection Activities: Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), 81 FR 45479, 45481 (July 14, 2016); First PRA Comment Request, 81 FR at 5113–14. Although the EEOC and OFCCP jointly collect the EEO-1 data through the JRC, as a practical matter, because the JRC is housed at the EEOC, employers submit their data to the EEOC.² See First Comment Request, 81 FR at 5118. After the JRC at the EEOC has collected and reconciled the EEO-1 data, the JRC provides the EEO-1 data of federal contractors to OFCCP.

Section 709(e) of Title VII of the Civil Rights Act of 1964 imposes criminal penalties and makes it unlawful for any officer or employee of EEOC from making public the employment data derived from any of its compliance surveys prior to the institution of any proceeding under EEOC's authority involving such information. However, this Title VII prohibition against disclosure applies by its terms only to officers and employees of EEOC, and reviewing courts have held that the provision does not apply to OFCCP. See 42 U.S.C. 2000e-8(e); *Sears, Roebuck & Co. v. General Services Admin.*, 509 F.2d 527, 529 (D.C. Cir. 1974). Accordingly, the EEO-1 data of federal contractors received by OFCCP are subject to the provisions of FOIA, meaning that members of the public may file FOIA requests asking OFCCP to disclose such records in its possession.

B. Legal Authorities Governing FOIA Requests for Potentially Commercial Confidential Information

Executive Order 12600 (EO 12600), published on June 23, 1987, established a formal process for notifying persons who submit confidential commercial information to the United States when that information becomes the subject of a FOIA request. 3 CFR 235 (1988),

² The EEOC maintains a web-based portal for employers' submission of the EEO-1 Report at <https://www.eeoc.gov/employers/eeo1survey/index.cfm>. At present, employers submit their Component 1 data through the existing EEOC portal but submit their Component 2 data through a separate filing system at <https://eeocomp2.norc.org/>.

reprinted in 5 U.S.C. 552 note (2012 & supp. V 2017). Exemption 4 to the FOIA protects against the disclosure of “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. 552(b)(4). EO 12600 is based on the principle that companies are entitled to notification and an opportunity to object to disclosure of this category of information before an agency makes a possible disclosure determination.

The Department’s regulations implementing EO 12600 can be found at 29 CFR 70.26. These regulations require the agency to notify submitters of a FOIA request when it has reason to believe that the information requested *may* be protected from disclosure under Exemption 4, but has not yet made a determination. 29 CFR 70.26(d)(2). Further, the Department’s regulations provide that when notification of a voluminous number of submitters is required, notice can be effectuated by posting and publishing it “in a place reasonably calculated to accomplish notification.” *Id.* at 70.26(j). Given OFCCP’s best estimate that the CIR FOIA request covers approximately 15,000 unique Covered Contractors, OFCCP is fulfilling its notification obligation through this Federal Register notice, a contemporaneous posting on the OFCCP website [INSERT LINK], and notification to all federal contractors and federal contractor representatives that have registered and provided electronic mail contact information through the agency’s Contractor Portal and/or have subscribed to OFCCP’s GovDelivery electronic mail listserv.

Once notified, the Department’s regulations state that submitters will be provided a reasonable time to respond to the notice. *Id.* at 70.26(e). If a submitter has any objection to disclosure, it is “required to submit a detailed written statement as to why the information is a trade secret or commercial or financial information that is privileged or confidential.” *Id.* If the agency receives a timely written objection, it will give careful consideration to the objection prior to making a decision whether the requested information should be disclosed or withheld under FOIA Exemption 4. Exec. Order No. 12,600, § 5. If the agency determines that disclosure is appropriate notwithstanding the submitter’s objection, the agency will provide the submitter

written notice of the reason for the decision, and a specified disclosure date that is a reasonable time subsequent to the notice. 29 CFR 70.26(f).

Two recent court decisions may be helpful for Covered Contractors to consider in determining whether information may be withheld under Exemption 4. In *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019), the Supreme Court addressed the meaning of the word “confidential” in the context of FOIA Exemption 4. The Supreme Court held that the term “confidential,” which is undefined in the FOIA statute, should follow the term’s “ordinary, contemporary, common meaning” at the time Congress enacted FOIA in 1966. The Court went on to state that “[t]he term ‘confidential’ meant then, as it does now, ‘private’ or ‘secret.’” *Id.* at 2363. Following the Court’s decision, the U.S. Department of Justice issued step-by-step guidance for Federal agencies to determine whether commercial or financial information provided by a person is “confidential” under Exemption 4. U.S. Department of Justice, Step-By-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential Under Exemption 4 of the FOIA, last updated Oct. 7, 2019 (available at <https://www.justice.gov/oip/step-step-guide-determining-if-commercial-or-financial-information-obtained-person-confidential>).

The other relevant court decision arose in the course of previous litigation between the Department and CIR. In *Center for Investigative Reporting v. U.S. Dep’t of Labor*, 424 F. Supp. 3d 771 (N.D. Cal. 2019), the district court addressed whether Type 2 Consolidated EEO-1 Reports of 10 federal contractors could be withheld under FOIA Exemption 4. After reviewing the evidence before it, including an extended discussion of declarations from several of the objecting submitters, many of which the court described as “conclusory” and containing “verbatim rationale,” the district court held that the evidence did not support a finding that the

EEO-1 reports were commercial, and thus the 10 Type 2 EEO-1 Reports at issue could not be withheld under FOIA Exemption 4. *Id.* at 778-79.³

Process for Submitting Objections to the CIR FOIA Request

Consistent with Executive Order 12600 and the Department's regulations, OFCCP is hereby notifying Covered Contractors of the CIR FOIA request. Covered Contractors have 30 days from the date of this Notice, or [INSERT DATE 30 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER], to submit to OFCCP a written objection to the disclosure of its Type 2 EEO-1 data. Written objections must be received by OFCCP no later than this date. To facilitate this process, OFCCP has created a web form through which Covered Contractors may submit written objections, which can be found at <https://www.dol.gov/agencies/ofccp/submitter-notice-response-portal>. OFCCP strongly encourages Covered Contractors that wish to submit written objections to utilize this web form to facilitate processing. Contractors may also submit written objections via e-mail at OFCCPSubmitterResponse@dol.gov, or by mail to the contact provided in this notice. Regardless of the delivery system used, any objections filed by Covered Contractors must include the contractor's name, address, contact information for the contractor (or its representative), and should, at minimum, address the following questions in detail so that OFCCP may evaluate the objection to determine whether the information should be withheld or disclosed pursuant to FOIA Exemption 4:

1. What specific information from the EEO-1 Report does the contractor consider to be a trade secret or commercial or financial information?
2. What facts support the contractor's belief that this information is commercial or financial in nature?

³ Following the district court's decision, one of the submitters attempted to intervene in the matter and appeal the decision to the Court of Appeals for the Ninth Circuit. However, the Ninth Circuit explicitly did not reach the merits of the district court decision regarding FOIA Exemption 4, ultimately dismissing the appeal because the attempted intervenor "did not file a timely notice of appeal of the judgment in favor of CIR" and thus concluding that "[w]e therefore lack jurisdiction to hear the merits of that appeal." *Evans v. Synopsis*, 34 F.4th 762 (9th Cir. 2022). Accordingly, the district court decision remains the only case explicitly addressing the "commerciality" of EEO-1 Report data.

3. Does the contractor customarily keep the requested information private or closely-held?
What steps have been taken by the contractor to protect the confidentiality of the requested data, and to whom has it been disclosed?
4. Does the contractor contend that the government provided an express or implied assurance of confidentiality? If no, were there express or implied indications at the time the information was submitted that the government would publicly disclose the information?
5. How would disclosure of this information harm an interest of the contractor protected by Exemption 4 (such as by causing foreseeable harm to the contractor's economic or business interests)?

In the event that a Covered Contractor fails to respond to the notice within the time specified, it will be considered to have no objection to disclosure of the information. *See* 29 CFR 70.26(e).

For Covered Contractors that do submit timely objections, OFCCP will independently evaluate the objection(s) submitted consistent with the agency's regulations described herein and other relevant legal authority. If OFCCP determines to disclose the information over the objection of the Covered Contractor, OFCCP will provide written notice to the Covered Contractor of the reasons the disclosure objections were not sustained, a description of the information that will be disclosed, and a specified disclosure date that is a reasonable time subsequent to the notice. *Id.* at 70.26(f).

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